IN THE

Supreme Court of the United States

October Term 1921.

No. [redacted]

FRANK GONSALVES,

Appellant,

vs.

MORSE DRY DOCK & REPAIR COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

CHARLES J. McDERMOTT,
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PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

IN THE

Supreme Court of the United States

October Term [illegible]

No. [illegible]

[illegible]

Appellant,

v.

[illegible]

[illegible]

IN THE

Supreme Court of the United States

October Term 1921.

No. 418.

October Term 1922, No. 125.

FRANK GONSALVES,
Appellant,

vs.

MORSE DRY DOCK & REPAIR COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Statement.

The libellant appeals to this Court from the dismissal of the libel by the District Court of the United States for the Eastern District of New York.

The libel was dismissed for lack of jurisdiction (fol. 12, page 8).

The libel alleges that the libellant is a ship fitter, a resident of the State of New York. He was em-

ployed by respondent, a (domestic) New York corporation. Libellant seeks to recover damages for personal injuries alleged to have been suffered by him while engaged in his employment on board S. S. "Starmount" on or about February 22nd, 1916, while that vessel was in the dry dock of a third concern, the Shewan Company, at the foot of 27th Street, Brooklyn, New York.

It is not specifically alleged that the vessel itself nor the dry dock was in navigable waters. The allegation is that the said respondent had charge of the work of repairing shell plates of the steamship "Starmount," which was then in the floating dry dock of the Shewan Company at the foot of 27th Street, Brooklyn, N. Y. That libellant was working for the respondent on board the said steamship in the work of making said repairs.

It appears in the record, that prior to the filing of this libel, libellant accepted the provisions of the Workmen's Compensation Law of the State of New York (libel, par. 10, page 3) and was awarded $13.46 per week and was paid such compensation until March, 1917, amounting to $956.42 (7, page 96) and he also instituted, or attempted to institute, an action in the Supreme Court of the State of New York to recover his damages at law.

He filed this libel Dec. 10, 1920, four years and nine months after the injury. By section 383 of the Code of Civil Procedure of the State of New York, as then existing, an action in a State Court, to recover damages for personal injuries resulting from negligence, must be commenced within three years.

POINT I.

The Court was without jurisdiction. There is no reason for denying the jurisdiction of the State Industrial Commission. The Workmen's Compensation Law abrogates the right of recovery.

The Workmen's Compensation Law of the State of New York in its main features has been held to be constitutional.

N. Y. C. R. R. Co. vs. *White,* 243 U. S., 188.
Mountain Timber Co. vs. *Washington,* 243 U. S., 219.

As we understand the latest decisions of this Court, interpreting,

Southern Pacific Co. vs. *Jensen,* 244 U. S., 205,
Knickerbocker Ice Co. vs. *Stewart,* 253 U. S., 156,

the Workmen's Compensation Law of this State, prescribing an exclusive remedy in case of injury to employees, has been declared unconstitutional by this Court *only to that extent which* contravenes the essential purposes expressed by the act of Congress, or works material prejudice to the charteristic features, of the general maritime law, or interferes with the proper harmony and uniformity of that law, in either international or interstate re-

lations. That as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by State Statutes. That, while the cause may be of a kind ordinarily within the admiralty jurisdiction, yet when the general employment contracted for and the workman's activites at the time, do *not* have any direct relation to navigation or commerce, but are local matters, then regulation of the rights, obligations and consequent liabilities of the parties as between themselves, by a local rule (the Workmen's Compensation Act) does not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. That under such circumstances the exclusive features of the State Workmen's Compensation Acts apply, and abrogate the right to recover damages in an admiralty court which would otherwise exist.

Western Fuel Co. vs. *Garcia,* 66 Sup. Ct. Rep. (Lawyers' Edition), 97;
Grant Smith Porter Co. vs. *Rhode,* 66 Sup. Ct. Rep. (Lawyers' Edition), 172;
State Industrial Commission vs. *Nordenholt Corp.,* 66 Sup. Ct. Rep. (Lawyers' Edition), 567.

We contend that this case comes directly within that principle and is governed by the expression of opinion of this Court in Grant Smith Porter Co. vs. Rhode, *supra,* as reiterated in the Insana (State Industrial Commission vs. Nordenholt) case.

There is a wide distinction between the character of *employments*, and the employments themselves, enumerated in group 8 and group 9 of the Workmen's Compensation Law of the State of New York. One relates to employees of the vessel or its owners; the other to local employees. Group 8 relates to the *operation* (including repairs) of vessels when operated or repaired *by the company*, while group 9 refers to "Ship building *including* the construction and repair of vessels in a ship yard."

Libellant in the case at bar lived in the State of New York, was employed by a domestic contracting corporation which would be guilty of a misdemeanor for non-compliance with the Workmen's Compensation Law.

People vs. *Donnelly*, 232 N. Y., 423.

He was not employed by a vessel or vessel owner, nor by "the Company" owning or operating the vessel, nor engaged in an occupation of a kind which required him to be "subjected to the laws of one jurisdiction today and another tomorrow," his "general employment" was not of a maritime nature—it was local in character—the mere fact that he happened at the time of his injury to be employed in work being done under a maritime contract is not the determining factor.

POINT II.

The exception to the libel for want of jurisdiction was properly upheld on another ground. It is not specifically alleged that the vessel, nor the dry dock in which the vessel was situated, was in navigable waters.

The decision of this Court in the "Insana" case, State Industrial Commission vs. Nordenholt, 66 Sup. Ct. Rep. (Lawyers' Edition), 567, leaves no further question as to the liability where the injury happens on a *dock*. It is contended that the "Starmount" was in navigable wates because of the decision in *The Jefferson*, 215 U. S., 142. This case is an authority for the simple proposition which we do not dispute that the *vessel* remains a "maritime subject" while in dry dock for repairs, *"for the purpose of passing upon claims for salvage services"* (page 143).

As has been said by this Court "the vessel itself was unimportant."

> *Atlantic Transport Co.* vs. *Imbrovek*, 234 U. S., 52 at 59.

Of course the distinction between jurisdiction of Courts of admiralty in contract and tort cases is too well understood to be more than casually referred to.

We are not interested here in dealing with the liability of the ship, as a responsible cause for this injury.

It was held by this Court in *Cope* vs. *Vallette Dry Dock Co.*, 119 U. S., 625, that a dry dock was

not a subject of salvage service any more than is a wharf or a warehouse when projecting into or upon the water.

In the *Robert W. Parsons,* 191 U. S., 17, Mr. Justice Brewer said:

> *"That a dry dock is to be considered as land* in the maritime law seems to be clear from the decision of this Court in Cope vs. Vallette Dry Dock Co., 119 U. S., 625, 7 Sup. Ct., 336, 30 L. Ed., 501."

See also

Ruddiman vs. *A Scow Platform,* 38 Fed., 158 and
Patton Tully Co. vs. *Turner,* 269 Fed., 334-337.

Under the Statutes of the State of New York a "dry dock" is a "terminal facility" (Ch., 154 L., 1921, Art. XXII), and is subject to the right of purchase by the port authorities.

The very question here involved has been passed upon by Thomas, District Judge, in the Eastern District of New York, from which District this appeal is taken.

The Warfield, 120 Fed. Rep., 847.

In this case the employee of the contractor was injured on the S. S. "Warfield," then in dry dock for repairs. Cited in *The Dredge A,* 217 Fed., 617.

In *Berton* vs. *Tietjen & Lang Dry Dock Co.,* 219 Fed., 763, the injury occurred while in defendant's employment and working upon a vessel in dry dock, the Court discussed the question at length, and the opinion upholds our contention.

Finally.

There is no pertinent Federal Statute. Application of the local law will not work material prejudice to any characteristic feature of the maritime law. The appellant's general employment was not maritime. The injury happened on land in the State of New York. The exclusive remedy is the Workmen's Compensation Law, of the provisions of which this libellant availed himself prior to filing this libel, thus indicating that the parties themselves believed they had contracted with reference to the State Statute (Record, page 3, par. 10th, libel). Libellant certainly did not *then* construe his "general employment" as maritime. He accepted the provisions and benefits of the "local law" and can still enforce his award of compensation through the State Courts. His right of *action* however is barred by the State Statute (Section 383, Code Civil Procedure).

The decree of the District Court should be affirmed.

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